

Breakfast Seminar Series

Hot Topic Update: Accommodation in the Workplace

Lynn H. Harnden
Vicky Satta

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Session Overview

- An employer's entitlement to employee's medical information
- Challenging medical evidence cited in support of accommodation
- An employer's obligation to accommodate certain family situations
- Do addicted employees get a free pass for misconduct?

Entitlement to Medical Information

Employer's Entitlement to Medical Information

- Medical information is of an extremely sensitive nature
 - Legitimate business needs of the Employer vs. the privacy rights of the employee
 - The collective agreement and applicable legislation can give the Employer authority to request information
 - In the absence of such authority an Employer must limit its request and information collection to facts and details that are reasonably necessary to accomplish its purpose
 - The more complex the accommodation, the higher the level of reasonably required medical information
 - Use the least intrusive means of collecting information

Nature of the Illness vs. Diagnosis

- **Diagnosis:** specific medical term which implies the exact causes and symptoms of the illness
 - Is normally excessive as it is not relevant or necessary for the purpose at hand
- **Nature of illness:** a general statement of a person's illness or injury in plain language without any technical medical details, such as diagnosis or symptoms
 - Reveals the essence of the situation
 - Preferable as it allows the Employer to accommodate without intruding on privacy

Stages of Medical Inquiry

- In order to manage it's workforce, the Employer may have:
 - notice of the absence
 - verification that it is due to illness or injury
 - a medically informed estimate of how long the absence is expected to be
- The Employer is entitled to know that the employee is:
 - unable to work due to illness or injury
 - the expected return to work date
 - what work the employee can or cannot do upon their return
 - if work restrictions are likely when the employee returns

Medical Certificates

- If a medical certificate is required, it is not unreasonable for an employer to ask that it include the reason why an employee is incapable of working due to illness or injury as part of their justification for the absence or a claim for benefits
- This can consist of a general statement of the nature of the illness or injury, without diagnosis or symptoms

Entitlement to Short-Term Disability Benefits

- Absent other authorization an Employer can require an employee to consent to release the following:
 - Certification that the employee was absent and unable to work because of injury or illness
 - Broad statement re the general nature of the illness or injury
 - That the employee has and is following a treatment plan (but not the plan itself)
 - Expected return to work date
 - What work employee can or cannot do
 - No return to work accommodation considerations unless there are likely to be restrictions when the employee returns

-Hamilton Health Sciences v. ONA (2007)

Brant Community Healthcare System v. ONA **(2008 – Harris)**

- Medical Form Grievance
- Hospital developed standard form for claiming short-term sick leave benefits
- Requested the “nature of the illness/injury” and the “current treatment” at the first instance of an absence exceeding 3 consecutive days
- Collective Agreement provided doctor’s certificate to be satisfactory to the Employer
- O.N.A. filed a policy grievance

Brant Community Healthcare System v. ONA **(2008 – Harris)**

- Arbitrator partially agreed with the Union
- Employer has no right to medical information unless Collective Agreement gives a right and employee consents to release of the information
- Collective Agreement – test of “objective reasonableness” in assessing whether doctor’s certificate is “satisfactory to the employer”
- Request for the “nature of the illness/injury” was reasonable
 - Should be a general statement without any technical medical details, including diagnosis or symptoms

Brant Community Healthcare System v. ONA **(2008 – Harris)**

- Not necessary for the Employer to know the “current treatment” to verify sick leave benefits
- Too much information at the *FIRST INSTANCE* of the leave process
- There are situations where more information might be necessary (i.e. longer absences/complex accommodations)

Challenging Medical Evidence Cited in Support of Accommodation

Legal Foundation for Challenge of Received Medical Information

- Collective Agreement
- Vague, incomplete information
- Subsequent contradictory information
- Third-party review

Checklist for Challenging Medical Information

- Check Collective Agreement
- Launch an objective, well-documented investigation
- Promptly communicate with the employee the basis of concern
- Request employee consent for more information
- DO NOT try to coerce the submission of additional information
- DO consider making eligibility for sick leave benefits / return to work contingent on co-operation

Successful Challenge:

City of Brampton and C.U.P.E. (2008 – MacDowell)

Facts

- City purchased smaller fuel-efficient cars in “green initiative” (Smart Cars) for use by its Property Standards Officers
- Grievor had adamantly protested against using the vehicles
- Grievor refused to drive Smart Car claiming he had a “psychological disability” (anxiety) and wanted to continue to drive his own small car or one of the City’s new Honda Hybrids by way of accommodation

City of Brampton and C.U.P.E. (2008 – MacDowell)

Facts

- Grievor initially submitted medical notes from family physician
- Grievor later provided letter from his psychologist stating that he had a fear of small cars due to his safety concerns
- City requested Grievor be sent for an IME
- Union and Grievor refused and filed a grievance alleging discrimination on the basis of disability and failure to provide accommodation

City of Brampton and C.U.P.E. (2008 – MacDowell)
Findings

- Grievor failed to provide reliable evidence that he suffered from a disability
- Family physician provided same information that was merely reported to him by the Grievor
 - “providing the patient with the paperwork to confirm the patient is ill, because the patient says he is”
- Psychologist – single one hour consultation based on assumption that what Grievor said was true and complete

City of Brampton and C.U.P.E. (2008 – MacDowell)
Findings

- Grievor had misled his health care providers, Employer and Arbitrator in describing the history of his condition and its effects on him
- Employer was right “not to blindly rely upon what an employee’s family doctor has to say”
- Not unreasonable to ask for an IME where reasonable and good faith doubts about the quality and completeness of the medical information
- Grievance was dismissed

Accommodation and Family Status

Family Status: Employer's Obligation to Accommodate

- Serious family / work conflicts
 - Employee care obligations for disabled / ailing family member (i.e. child / parent)

- Commonplace family / work conflicts
 - Need for bonding-time
 - Need for attending recreational / social functions

Leading Cases – Two Different Tests

***Campbell River* (2004 – B.C. Court of Appeal)**

- Test for whether employer's refusal of childcare request was discriminatory
- Higher threshold for making a case for *prima facie* discrimination
- *Prima facie* discrimination if:
 - a) A change in a term or condition of employment
 - b) Resulting in a serious interference with
 - c) A substantial parental or other family duty or obligation of the employee

Leading Cases – Two Different Tests

***Hoyt v. Canada National Railway* (2006 – CHRT)**

- More liberal test
- *Prima facie* discrimination test, the complainant must demonstrate:
 - a) The complainant had parental status and was incurring the duties and obligations attached thereto; and
 - b) Those duties and obligations, combined with an employer rule render the complainant unable to participate fully and equally in employment

Also – *Johnstone v. Canada* (A.G.) (2007 – Fed. Ct.; 2008 – F.C.A.)

Ordinary Family Obligations

Rennie v. Peaches & Cream Skin Care Ltd. (2006 – Alberta Human Rights Panel)

- *Prima facie* discrimination found
- Beauty salon fired an employee for refusing to work her regularly scheduled one evening shift per week on return from her 3rd maternity leave. Difficulties in finding child care
- Employer allowed employee several weeks after returning from leave to find care or make alternative arrangements, but would not budge on requirement she work one evening per week
- Terminated for BFOR and employer had accommodated to point of undue hardship

Ontario Human Rights Commission

- *Policy and Guidelines on Discrimination Because of Family Status (March 2007)*
 - Family status defined as being a “parent and child” or parent and child “type” relationship
 - Includes adoptive relationships, aging parents, no-blood relationships
- Policy resembles a middle-ground approach between the narrow position in *Campbell River* and the very wide approach adopted in Federal jurisdiction

Ontario Human Rights Commission

- Policy expressly refers to *Campbell River*:
 - “[n]ot every circumstances related to family status and caregiving will give rise to the duty to accommodate ... [but i]n most circumstances where there is a significant conflict between an important caregiving responsibility and an institutional rule, requirement, standard or factor, a duty to accommodate will arise”
- The more substantial the care situation (i.e. serious illness) the more likely the duty to accommodate will arise

Teamsters Local Union 847 & Trans4 Logistics (2008 – Trachuk)

- Grievor terminated under “deemed termination” clause
- Employer provided transportation/logistical services for Staples
- Grievor claimed Employer discrimination based upon family status

Teamsters Local Union 847 & Trans4 Logistics (2008 – Trachuk)

- Arbitrator dismissed the grievance, adopting the *Campbell River* test
- *Campbell River* “provides a balance between an employee’s responsibility to make arrangements to meet her or his family obligations in accordance with the requirements of the workplace and an acknowledgement that an employer’s actions may interfere with those obligations.”

Teamsters Local Union 847 & Trans4 Logistics (2008 – Trachuk)

- “...discrimination on the basis of family status requires action on the part of the employer that negatively impacts on an employee with extraordinary parental obligations.”
- Arbitrator did not address inconsistency between *Campbell River* and *Johnstone and Hoyt*

Cases That Have Followed the *Campbell River Test*

- *Coast Mountains School District No. 82 v. British Columbia Teachers' Federation*, [2006] B.C.C.A.A.A. No. 184
- *Palik v. Lloydminster Public School Division #99*, [2006] 58 C.H.R.R. D/149 (Sask. H.R.T.)
- *Canadian Staff Union v. Canadian Union of Public Employees*, [2006] N.S.L.A.A. No. 15 (Christie)
- *Teamsters Local Union 847 v. Trans4 Logistics*, 2008 CanLII 65147 (Trachuk)

Cases That Have NOT Followed the *Campbell River Test*

- *Hoyt v. Canadian National Railway*, 2006 CHRT 33 (CanLII)
- *Johnstone v. Canada (Attorney General)*, 2007 FC 36 (CanLII); 2008 FCA 101

Family Status – Best Practices

- **Foster an open-environment**
 - Employees should be comfortable in disclosing special care obligations
 - Fewer surprises, more time to prepare
- **Have a financially quantifiable and documented accommodation program**
 - Provide flexible scheduling absences for special care situations
 - Employee Assistance Programs
 - Childcare services
 - Telework
- **Accommodation must be justified**
 - Case-by-case investigation
 - Give only what the employee reasonably needs

Addicted Employees and Misconduct

Addictions and the Brain – New Insights

- Researchers are developing a more detailed understanding of how deeply and completely addiction can affect the brain, by hijacking memory-making processes and by exploiting emotions.

➤ *How We Get Addicted*, Michael D. Lemonick, Time Magazine (July, 2007).

Addictions and the Brain – New Insights

- Parts of the brain involved in monitoring behaviours and emotions show different levels of activity in cocaine users relative to non-drug users even when both groups perform equally well on a psychological test. These results suggest that such impairments may underlie addictive vulnerability.

Whether these brain differences are an underlying cause or a consequence of addiction, the brain regions involved should be considered targets for new kinds of treatments aimed at improving function and self-regulatory control.

➤ *Brain-Behaviour Disconnect in Cocaine Addiction*, Science Daily (May 26, 2009)

Addictions and the Brain – New Insights

- The part of the prefrontal cortex that is involved in deliberative cognition is shut down by stress...It's supposed to be, but it's even more inhibited in substance abusers. A less responsive prefrontal cortex sets up addicts to be more impulsive as well.
 - *How We Get Addicted*, Michael D. Lemonick, Time Magazine (July, 2007).

Addictions and the Brain – New Insights

- Evidence is building to support the 90-day rehabilitation model....It turns out that this is just about how long it takes for the brain to reset itself and shake off the immediate influence of a drug.
- Researchers at Yale University have documented what they call the sleeper effect--a gradual re-engaging of proper decision making and analytical functions in the brain's prefrontal cortex--after an addict has abstained for at least 90 days.
 - *How We Get Addicted*, Michael D. Lemonick, Time Magazine (July, 2007).

Costs of Addiction

- Indirect productivity costs of \$24.3 billion to the Canadian economy in 2002 (Canadian Centre on Substance Abuse)
- Direct/indirect costs include:
 - Absenteeism
 - Lost productivity
 - Death/injury
 - Theft
 - High turnover/training costs
 - Drug programs/healthcare costs
 - Legal liability
 - Loss of reputation

Symptoms of Addiction

- | | |
|---------------------------------------|-----------------------------|
| ▪ Increased absenteeism | ▪ Depression |
| ▪ Mood swings | ▪ Paranoia |
| ▪ Lying | ▪ Irrational behaviour |
| ▪ Increased washroom breaks | ▪ Dilated pupils |
| ▪ Questionable excuses for absence(s) | ▪ Slurring of speech |
| ▪ Low productivity | ▪ Difficulty of gait |
| ▪ Forgetfulness | ▪ Dryness of lips and mouth |
| | ▪ Nervous twitching |

Challenges in Dealing with Addicted Employees

- Addiction can affect the culpability of the employee's misconduct
- Culpable Misconduct:
 - While under the influence
 - While not under the influence
- Non-Culpable Misconduct:
 - Absenteeism
 - Poor work performance

Arbitration/Court Approaches to Misconduct and Addiction

- Disciplinary model
- Therapeutic model
- Hybrid model
 - Combines a disciplinary response with a therapeutic approach to the addiction/disability
 - Imposition of a penalty, such as a suspension, combined with a series of strict conditions, i.e. participating in a treatment program
 - No set formula except the just cause analysis must be kept separate from the human rights analysis
 - Developed and then rejected in BC

Legal Aid Lawyers Assn. v. Manitoba **(2009 – Graham)**

- Grievor, legal aid lawyer, discharged after criminal charges for off-duty conduct
- Failed to report these charges to employer in violation of policy
- Grievor addicted to cocaine at time of his termination
- Arbitrator adopted hybrid approach
- Substituted a 2-month suspension for the discharge and reinstated on strict conditions

Legal Aid Lawyers Assn. v. Manitoba **(2009 – Graham)**

“I find that the Grievor's thought process with respect to not immediately reporting the events of May 2nd was adversely affected by his propensity as an addict, in the secondary stage of dependency, to avoid disclosing his purchase of cocaine to his employer, which disclosure would have revealed the continuing effects of his dependency. I therefore also find that the Grievor's disability, i.e. his addiction, was a factor in his termination.”

Limits to Accommodation:
Robinson Solutions Inc. v.
CAW-Canada Local Union 2163 (2009 – Reilly)

- Termination grievance (30 year-old worker employed for 4 years)
- Excessive absenteeism
- Grievor told his employer he had a cocaine addiction and was given time off to participate in an in-house assistance program
- Returned to work, but continued to have attendance problems
- Used a doctor's note he received as a template to forge 8 medical notes for further absences over a period of 9 months
- Grievor claimed he was suffering from addiction and should be accommodated

Limits to Accommodation:
Robinson Solutions Inc. v.
CAW-Canada Local Union 2163 (2009 – Reilly)

- Arbitrator upheld the dismissal
- Employer had already accommodated the grievor to the point of undue hardship
- Lengthy history of forgeries displayed lack of trustworthiness
- *“One must be careful to ensure that the Code is not used as the last refuge of rascals.”*

Questions?